Sweet Street Desserts, Inc. *and* United Food and Commercial Workers Union, Local 1776, AFL–CIO. Cases 4–CA–22621 and 4–RC–18360

October 17, 1995

DECISION, ORDER, AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

The issues presented in this case are whether the judge correctly found that the Respondent committed several violations of Section 8(a)(1) and (3) of the Act, that certain of those unfair labor practices constituted objectionable conduct requiring the invalidation of a representation election, that the Respondent did not unlawfully solicit an employee's grievances, and that other preelection conduct by the Respondent was not objectionable.[1] The Board has considered the judge's decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions,[3] except as discussed below, and to adopt the recommended Order as modified.[4]

The General Counsel excepts to the judge's failure to find that Mary Ann Good, the Respondent's production manager, violated Section 8(a)(1) of the Act by soliciting grievances during a conversation with employee Linda Lias. Good initiated this plant floor conversation on April 11, 1994, 3 days after the Respondent had received a letter from the Union identifying Lias as one of five employee organizers. According to credited employee testimony, Good told employee Lias that if Lias had any problems, Lias could come to her. After Lias responded that she had done that and was not heard, Good replied that she could speak to her supervisor. The judge found that, earlier in this conversation, Good had unlawfully interrogated Lias about her union sentiments and threatened the loss of benefits if the employees orgainized. He further found, however, that it was not coercive for Good simply to suggest that Lias take up her problems with the existing supervisory hierarchy.

We disagree with the judge's analysis. It is apparent from the credited testimony that management had not previously been receptive to complaints from Lias. On April 11, however, Good initiated a conversation with Lias, inquired about her union sentiments, threatened adverse consequences from unionization, then encouraged Lias to discuss her problems with Good or a supervisor. Under these circumstances, we find that Lias would reasonably view Good's remarks as a solicitation of grievances with the implicit promise to correct them, in marked contrast to Lias' apparent past experience, if Lias would oppose the Union. We therefore conclude that by this conduct the Respondent violated Section 8(a)(1) of the Act.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, Sweet Street Desserts, Inc., Reading, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(d) and reletter the subsequent paragraphs.

''(d) Soliciting employee complaints and grievances with the implicit promise to remedy them.''

2. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

''(d) Rescind its unlawfully broad 'Distribution' policy and its unlawfully adopted 'Access/Distribution/-Solicitation' policy.''

[1] On June 7, 1995, Administrative Law Judge Peter E. Donnelly issued the attached decision. The Respondent, the General Counsel, and the Charging Party each filed exceptions and a supporting brief. The General Counsel filed an answering brief to the Respondent's exceptions, and the Respondent filed oppositions to the exceptions of the Charging Party and the General Counsel and a reply brief to the General Counsel's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] The Respondent and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all relevant evidence convinces us that they are incorrect. *Standard Drywall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] In light of our adoption of the judge's recommendation to sustain the Union's Objections 3 and 4, we find no need to pass on the Union's exceptions to the recommended overruling of Objections 1, 2, 4, 6, 12, and 18. In the absence of exceptions, we adopt, pro forma, the judge's recommendation to overrule the Union's Objections 14 and 17.

[4] In accord with the General Counsel's exceptions, we shall modify the recommended Order and substitute a notice in order to add remedial requirements that the Respondent rescind its unlawfully broad ''Distribution'' policy and its unlawfully adopted ''Access/-Distribution/Solicitation Policy.''

[5] Member Cohen disagrees with his colleagues' conclusions that the Respondent violated Sec. 8(a)(1) by soliciting grievances with an implied promise to remedy them. The evidence shows that Production Manager Good began the relevant portion of the conversation by stating that Lias could come to her with any problems that she had. Lias responded that she had tried that approach and had not been successful. At that point, Good responded that Lias could speak to her supervisor. As the judge correctly observed, Good was thereby simply describing the existing hierarchy, i.e., it went from the employee to the supervisor and then to Good. Thus, Lias was told to go to her supervisor before going to Good. In these circumstances, the Respondent was simply giving a road-map of the hierarchy; the Respondent was not soliciting grievances with an implied promise to remedy them. Indeed, when Lias responded that she did not know that speaking to a supervisor would get results, the Respondent did not suggest otherwise. There was no promise of a remedy, implied or otherwise.

3. Substitute the attached notice for that of the administrative law judge.

[Direction of Second Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT suspend or otherwise discriminate against employees for engaging in union and/or protected concerted activity.

WE WILL NOT interrogate employees about their union sentiments or activities.

WE WILL NOT threaten employees with loss of benefits if they select union representation.

WE WILL NOT solicit employee complaints and grievances with the implicit promise to remedy them.

WE WILL NOT tell employees that their selection of union representation would be futile.

WE WILL NOT threaten employees with loss of employment or transfer to less desirable shifts as a consequence of engaging in a strike.

WE WILL NOT create the impression among employees that their union activities are under surveillance.

WE WILL NOT maintain and enforce an unlawfully broad ''Distribution'' policy.

WE WILL NOT maintain and enforce an unlawfully adopted ''Access/Distribution/Solicitation'' policy.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Gregory Diaz, Jackie Titus, Daisy Martinez, and Glenda Gomez whole for any loss of pay they may have suffered as a result of the discrimination practiced against them with intertest.

WE WILL expunge from our files any reference to the suspensions of Gregory Diaz, Jackie Titus, Daisy Martinez, and Glenda Gomez and notify them in writing that this has been done and that evidence of their unlawful suspensions will not be used as a basis for future personnel action against them.

WE WILL rescind our unlawfully broad ''Distribution'' policy and our unlawfully adopted ''Access/-Distribution/Solicitation'' policy.

SWEET STREET DESSERTS, INC.

Steven B. Goldstein, Esq., for the General Counsel.
William J. Rosenthal, Esq. and *Mark J. Swerdlin, Esq.*, of Baltimore, Maryland, for the Respondent.
Robert Curley, Esq., of Norristown, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

PETER E. DONNELLY, Administrative Law Judge. With respect to the representation case, the petition was filed by United Food and Commercial Workers Union Local 1776, AFL–CIO (the Union or Charging Party) on May 2, 1994,[1] and a stipulated election agreement was approved by the Regional Director on May 24, providing for an election to be held among the employees of Sweet Street Desserts, Inc. (the Employer or Respondent) on June 30. The Union lost the election by a vote of 170 to 57, with 31 challenged ballots which were insufficient to affect the results of the election.

Objections to the election were filed by the Union on July 8 alleging various misconduct by the Employer between the date of the filing of the petition and the date of the election, sufficient to warrant setting aside the election. On October 28, the Regional Director issued a report and recommendations on objections to election and notice of hearing subsequently adopted by Board Order dated December 30, concluding that 14 of the 20 objections filed by the Union raised material and substantial issues of fact warranting a hearing. The remaining six objections were dismissed.

With respect to the unfair labor practice case, the original charge here was filed by the Union on April 8 and amended on May 24. A complaint and notice of hearing issued on July 11 and an amendment to the complaint issued on January 11, 1995, alleging that Respondent violated Section 8(a)(1) of the Act by various misconduct as set forth in the complaint. In addition, the complaint alleges that Respondent violated Section 8(a)(3) of the Act by unlawfully suspending employees Gregory Diaz and Glenda Gomez. Answers to the complaint and amendments to complaint were timely filed by Respondent.

On January 19, 1995, the Regional Director issued an order consolidating objections and the unfair labor practice allegations for a hearing, which was held before me on January 30 and 31, February 1, and March 7–9, 1995.[2]

Briefs have been timely filed by the General Counsel, Respondent, and the Union which have been considered.[3]

FINDINGS OF FACT

I. EMPLOYER'S BUSINESS

The Employer is engaged in the production and distribution of pastry at its facility in Reading, Pennsylvania. During the past year, Respondent sold and shipped products valued in excess of $50,000 directly to points outside the Commonwealth of Pennsylvania. The complaint alleges, the answer

[1] All dates refer to 1994 unless otherwise indicated.

[2] On motion by the General Counsel, par. 7 of the complaint was dismissed at the hearing. Also, on motion by the Union, Objections 13, 15, 16, 19, and 20 were withdrawn at the hearing. Further, the suspension of Gregory Diaz was deleted from Objection 3 as occurring prior to the petition having been filed. There remains for consideration here Objections 1, 2, 3 (Glenda Gomez), 4, 6, 12, 14, 17, and 18.

[3] No opposition thereto having been filed, the General Counsel's motion to correct transcript is granted.

admits, and I find that the Employer is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES[4]

A. *Facts*

1. The 8(a)(1) allegations

a. *Respondent's ''Access/Distribution/-Solicitation Policy''*

By way of background, it appears that an effort was made in early 1993 to organize Respondent's employees. In August 1993, Respondent conducted an employee survey in the form of a questionnaire concerning employee attitudes about their conditions of employment, including a question asking whether or not the employees felt that a union would be good for Sweet Street.

On March 17, at a meeting of supervisory and management employees, Respondent announced its implementation of an ''Access/Distribution/Solicitation'' policy effective March 17. This policy reads:

> ACCESS/DISTRIBUTION/SOLICITATION POLICY
>
> Due to Sweet Street's limited physical facilities, including limited parking areas, and due to the necessity of maintaining a pleasant and secure environment for our employees and customers, the following policies must be observed by all employees:
>
> (For the purpose of these policies, ''employee/s'' refers to all permanent and temporary employees.)
>
> *ACCESS POLICY*
>
> Only authorized persons and off-duty employees are allowed on Sweet Street grounds, such as the parking lots. Employees who rely on non-employees for transportation can be dropped off at the employee entrance. When waiting to pick up employees, the drivers will be required to park off Sweet Street property such as on William Lane.
>
> Only authorized persons are allowed in the plant building. Authorized persons include (1) our active employees when on duty, when on their lunch or coffee breaks, during a period of thirty minutes prior to coming on duty and during a period of thirty minutes after going off duty and (2) individuals having official business with the Company.
>
> Employees are to report any unauthorized personnel on the Company premises to their supervisors and/or security personnel immediately.
>
> *DISTRIBUTION POLICY*:
>
> Employees may not distribute materials of any kind, including printed or other literature for any purpose (such as religious materials, chain letters etc.) in any work area, or if either party to the distribution is on working time for the Company, unless such material is distributed pursuant to the employee's work duties or is related to the Company's operations. Working areas including the manufacturing areas, office and reception areas, storage areas, trailers, locker rooms and outlet stores. Working time is all time when an employee's duties require that he or she be engaged in work tasks, but does not include an employee's own time such as lunch breaks.
>
> *SOLICITATION POLICY*:
>
> Every employee's work deserves his or her full attention during scheduled working time. Accordingly, employees may not solicit other employees for any purpose while either person is on working time. Working time is all time when an employee's duties require that he or she be engaged in work tasks, but does not include an employee's own time such as lunch breaks.
>
> *POSTING OF NOTICES*
>
> Announcements or notices unrelated to Company business may not be posted.

On March 24, due to complaints from employees, the ''Access Policy'' was revised to read as follows:

> *ACCESS POLICY*
>
> Only authorized persons and off-duty employees are allowed on Sweet Street grounds, such as the parking lots. Employees who rely on non-employees for transportation can be dropped off at the employee entrance. Employees may make arrangements to be picked up at the employee entrance. This activity is limited to pick-up ONLY.
>
> *Only* authorized persons are allowed in the plant building. Authorized persons include (1) our active employees when on duty, when on their lunch or coffee breaks, during a period of *thirty* minutes prior to coming on duty and during a period of thirty minutes after going off duty and (2) individuals having ''official business'' with the Company.
>
> Employees are to report any unauthorized personnel on the Company premises to their supervisor and/or security personnel immediately.

In addition, Respondent deleted an entire provision captioned ''Employee Lockers,'' which had required employees to use locks provided by Respondent and to submit to searches of their lockers.

At the end of the March 17 meeting, according to Terry Sprecher, one of those supervisors present, they were told by Mary Ann Good, production manager, that it was ''that time of year again, union time,'' apparently a reference to the organizational effort in early 1993, and said that they should

[4] There is conflicting testimony regarding some of the allegations of the complaint and objections. In resolving these conflicts, I have taken into consideration the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or lack of it; and consistencies or inconsistencies within the testimony of each witness and between the testimony of each and that of other witnesses with similar apparent interests. In evaluating the testimony of each witness, I rely specifically on their demeanor and make my findings accordingly. And while apart from considerations of demeanor, I have taken into account the above-noted credibility considerations, my failure to detail each of these is not to be deemed a failure on my part to have fully considered it. *Walker's*, 159 NLRB 1159, 1161 (1966).

keep their eyes and ears open and that gossip and rumors about the Union should be reported to management. Good denied making this statement. Having reviewed the relevant testimony, however, I am satisfied that Sprecher's account is more credible.

It was stipulated that prior to March 17, Respondent had no rule limiting distribution, solicitation, or the posting of notices. The Sweet Street welcome book did contain a prohibition limiting access to company property as follows:

> *EMPLOYEE ACCESS TO COMPANY PROPERTY*
>
> This policy supports our belief in providing a secure environment in which to work. The goal of this policy is to prevent loitering in hallways and public areas of the plant by people who are not on duty.
>
> Regular, hourly off-duty employees will not be admitted to the plant during times when they are not scheduled for work.
>
> It is understood that employees may wish to arrive for work an hour or less before their start time to prepare for work or communicate with co-workers.
>
> Individuals who have separated from the company for any reason will not be permitted on Sweet Street property; in the plant, the employee parking lot, or the grounds. These individuals may report to receive their final paycheck on the appointed day by registering at the front desk and waiting in the lobby for the personnel representatives. Former employees are, of course, always welcome as patrons in either public retail outlet store.
>
> Violators of this policy will be asked to leave. Responsibility for enforcing the policy rests with the security guards, the management staff and the leadership team.

There appears to be no written policy limiting how long an employee could remain on the premises after the end of his or her shift.

With respect to the prohibition of distribution in locker rooms under the distribution policy, it appears that there are separate locker rooms for men and women and that they are used to change from street clothes into work uniforms before punching in for work and to change back into street clothes before checking out. The locker rooms are located separately from the production area and adjacent to the employees' cafeteria. It does not appear that production work is performed in either the men's locker room or the women's locker room, although it may be necessary for employees to repair to the locker rooms without punching out in order to change a soiled uniform or, in the case of the men's locker room, for mechanics to obtain small tools which are kept in their lockers. Employees also access the patio[5] through the locker rooms.

With respect to the necessity for establishing a distribution policy, since none existed prior to March 17, Patrick Boylan, vice president of administration and chief financial officer, testified that beginning in late 1993, he began hearing about chain letters and fund raising material being left in the locker rooms, although he could recall complaints from only about four or five employees. None of these testified at the hearing. Sprecher, a supervisor, and employee Linda Lias testified that while there had been distributions of material for various purposes, this did not create any problem in the workplace. Respondent concedes that it could not produce any documentation to support the existence of any problem in the distribution of material between employees.

With respect to the solicitation policy, it is clear that there were solicitations at the plant for such items as Avon, Amway, Tupperware, and Mary Kay cosmetics, as well as fund raising solicitations. Sprecher testified that one of the maintenance employees sold sandwiches. Boylan and Nancy Reed, employee relations manager, testified that complaints were raised at meetings by employees to the effect that they were being ''pressured'' and asked if something could be done about it. As with the distribution rule, Respondent was not able to provide, pursuant to subpoena, any documentary evidence to support the existence of a problem.

The access policy, according to Boylan and Reed, was made more restrictive in response to several factors. There had been an increase in incidents of theft between employees and an overcrowding in the production area which created safety concerns, particularly in light of the large increase in the complement of production employees over the years. Further, congestion and noise factors made it necessary to establish dropoff and pickup by nonemployees at the employee entrance. According to Boylan and Reed, the access policy was also designed to prevent theft of confidential information such as recipes. Respondent also expressed concern about the sale and use of drugs because drug paraphernalia had been discovered on plant property. Boylan and Reed testified to steps taken by them in 1993 and early 1994 to address these problems. From mid-1993 to early 1994, Respondent executed confidential agreements with outside contractors and developed a noncompete agreement to be executed by its executives.

At the time the ''Access/Distribution/Solicitation Policy'' was first announced on March 17, Respondent contends that it was unaware of any union activity with respect to its employees although there had been a union organizational effort underway since early 1994 and an organizational meeting at Sprecher's house on February 12.[6] Respondent's officials testified that they heard rumors of union activity in late March and that its first specific information to that effect was contained in an organizing letter dated and faxed on April 8 from Wendel Young III, president of the Union, to Sandy Solomon, president and owner of Respondent, identifying Omar Mincey, Gregory Diaz, Michelle Seidel, Betsy Rupp, Renee Copeland, and Linda Lias as ''assisting UFCW Local 1776 with its effort to organize Sweet Street'' and warning that any discrimination against them would violate the National Labor Relations Act.

b. *The 8(a)(1) allegations—Solomon*

On April 5, according to employee Linda Lias, she was approached by Solomon in the cafeteria. After an exchange of small talk about their children, Solomon asked her if she had been contacted by anyone from the Union and Lias admitted that she had been contacted. Solomon asked her how she felt about the Union and Lias, although she had signed

[5] The outside patio is an area used for workbreaks and lunch, where smoking is permitted.

[6] Sprecher apparently was not aware until later that as a supervisor, she could not be represented by the Union.

an authorization card on February 12, replied that she did not know either way. At the end of the conversation, Solomon told Lias that she hoped that they could settle their differences.

While Solomon did not testify about any conversation on April 5, she testified that on April 7, she spoke to Lias because Lias, whom she regarded as her friend, had snubbed her the day before. In conversation, Lias denied there was any problem and they discussed work-related matters. Solomon denied any discussion about the Union.

Renee Copeland, another employee, testified, under subpoena, that on April 6, she was approached by Solomon at which time Solomon told her that she was aware that Copeland was campaigning (for the Union) and so was she (for the Company). Solomon reminded her that when her previous job had been abolished, the Company had found another one for her instead of discharging her and that she should take that into consideration in making a decision. Solomon denied having made any such statement, but did recall telling Copeland that she knew she was unhappy in her present job and reminded her that the Company took care of everyone; never laid people off.

Having reviewed the relevant testimony in resolving the differences between the testimony of Solomon and that of Lias and Copeland, I am satisfied, to the extent that those accounts vary, that the testimony of Lias and Copeland is the more accurate and should be credited, particularly with respect to Copeland since she was no longer employed, was subpoenaed to appear, and had little to gain by any fabrication.

c. *The 8(a)(1) allegations—Betty Hyneman*

Copeland also testified to a conversation on April 6 with Betty Hyneman, a supervisor, wherein, according to Copeland, Hyneman stopped her as she was returning from the bathroom and told her there was union talk going around and that Copeland had a ''big effect'' on other employees. Hyneman went on to tell Copeland that the Union was not good for Sweet Street and that Solomon would never sign a contract. Further, that they would lose their profit sharing and that people with 8 years' seniority would lose everything in the profit-sharing plan and have to start all over again. Also, that if they went on strike, they might come back on the second or third shifts and make less money. Hyneman denies having made these statements but concedes that she did remind Copeland of several benefits that the employee enjoyed such as birthdays, holidays, vacations, and Christmas bonuses. She also told Copeland that her own experiences at unionized companies were not good; that she felt she was paying for nothing and did not need a middleman. She told Copeland about the experience of her father who went on strike, was replaced, and was never able to get his old job back, being forced onto another shift. She also testified that she told Copeland that no one could predict what the results of any negotiations would be.

Having evaluated the testimony of both Hyneman and Copeland, I am persuaded that Copeland rendered the more accurate testimony and I credit her, particularly, noted above, since Copeland was no longer employed by Respondent and her testimony was obtained by subpoena, factors which negate any motivation to falsify her testimony.

d. *The 8(a)(1) allegations—Mary Ann Good*

As noted earlier, on April 8, the Union sent to Respondent a letter identifying the union organizers, including Lias. Lias testified that on April 11, on the plant floor, she was approached by Good who, in conversation with her, asked how she felt about the Union. Lias responded that she did not know and they discussed other matters. Later in the conversation, Good said that if the Union got in, they had a lot to lose, and specifically stated that they could lose their profit sharing. Good also told Lias that if she had any problems, she could come to her. Lias responded that she had done that and was not heard, to which Good replied that she could speak to her supervisor and Lias responded that she did not know if talking to them would get results.

Sprecher testified she was standing nearby during this conversation and that, on seeing Lias getting upset, she joined the conversation and heard Good ask Lias how she felt about the Union and heard Lias respond that she did not know any more. Sprecher also testified that she heard Good say that they could lose their profit sharing and also that, after Lias left, Good told Sprecher that Lias was ''hard core.''

Good's version of the conversation was that she spoke to Lias about her husband's experiences with the Union and her own unfavorable opinion of them as supporting lazy people, regardless of performance. When Lias said that no one listened to her problems, Good told her that she could come and talk to her.

In reviewing the testimony of Good, Lias, and Sprecher, for the purpose of making credibility resolutions, I am persuaded, based on the credibility criteria set out above, that the testimony of Lias and Sprecher should be credited. In this regard, I note those aspects of the conversation about which the testimony of Lias and Sprecher was mutually corroborative.

2. The 8(a)(3) allegations

a. *Suspension of Gregory Diaz*

As noted above, the ''Access/Distribution/Solicitation Policy'' was announced and became effective on March 17 as thereafter revised on March 21. The access portion of those rules provides, inter alia, that employees were not allowed in the plant building for more than 30 minutes before or after their shifts, except for those having ''official business'' with the Company. Under the prior access policy, employees were allowed into the plant up to an hour prior to the starting times of their shifts.

Nancy Reed, employee relations manager, testified that at about 4:20 p.m. on April 6, she observed Diaz in the plant cafeteria. Since his starting time was 5 p.m., this meant he was in violation of the new access policy by 10 minutes. Reed contacted Diaz' supervisor, Kim Weitzel, and told her that Diaz should be suspended for violating the access policy, and Diaz was suspended for 1 day.

It appears that after Diaz returned from his suspension, he complained that three other employees who also had violated the access policy on April 6—Jackie Titus, Daisy Martinez, and Janet Steininger. Thereafter, both Martinez and Titus were given 1-day suspensions. Steininger, however, was not because Respondent determined that she was on ''official

business'' with the Company, returning an employee survey to the Human Resources Department.[7]

b. *Suspension of Glenda Gomez*

Glenda Gomez, an employee in the finishing department, signed an authorization card on March 23. Respondent was advised by letter dated April 11 from Gomez, on the Union's letterhead, that she was assisting the Union in its organizational effort.

On May 6, according to Cathy Witter, Respondent's benefits and placement manager, she was approached by Janet Steininger who told her that she was being threatened and intimidated by Gomez, Diaz, and another employee, Regina Morrison. Witter asked Steininger if she wanted to file a written complaint and that she had a form that Steininger could use. Steininger filled out the complaint in Witter's office. Witter then went about investigating the complaint by interviewing several witnesses. Based on the results of those interviews, Witter determined that there was sufficient cause to suspend Gomez. On May 16, Gomez was called into Witter's office. Boylan, Reed, and Weitzel were present, however, Witter was not. Gomez was informed that she was being suspended for 24 hours for threatening and harassing an employee and that the investigation was continuing. Gomez responded that this was ''bogus bullshit'' and left the office.

The following day, after her suspension ended, she returned and met again with Boylan and Reed.[8] For the first time, she was told the identity of the complainant.

Gomez asked for a list of the witnesses and was told by Boylan that they would not be made available to her; that she did not need to know who the witnesses were. Gomez was also advised that her suspension was being extended another 24 hours because the investigation was not yet completed. On the following day, May 18, when she returned, she was told that because she had only ''partial involvement'' in the matter, her punishment would consist of a 1-day suspension and that she would be paid for the second day that she had been suspended.

Gomez denied having made any of the statements attributed to her which formed the basis of the suspension.

B. *Discussion and Analysis*

1. The 8(a)(1) allegations

a. *Distribution policy*

Generally, a no-distribution policy will be deemed unlawful if it restricts distribution on nonworktime in nonwork areas. *NLRB v. Magnavox Co. of Tennessee*, 415 U.S. 322, 324 (1974). The General Counsel argues that the ''Distribution Policy'' portion of the ''Access/Distribution/Solicitation Policy'' here is unlawful since, by its terms, it prohibits distribution in nonwork areas, i.e., the locker rooms.

The record discloses that while employees do have occasion, somewhat infrequently, to visit the locker rooms during the workday while they are still on the clock, it is clear that no production work is performed there and that the locker rooms are used primarily as a place for employees to change clothes before and after work. In these circumstances, even though employees may occasionally, for brief periods, visit or pass through this area, it is not a ''work area'' and restricting the distribution of materials in such areas violates Section 8(a)(1) of the Act. See *Filene's Basement Store*, 299 NLRB 183, 210 (1990), where the Board held that prohibiting solicitation on breaktime was discriminatory even though the work breaks were paid time.

b. *''Access/Distribution/Solicitation Policy'' in general*

The General Counsel takes the position that apart from the unlawful ''Distribution Policy,'' the announcement and implementation of the entire ''Access/Distribution/Solicitation Policy,'' while not unlawful on its face, is nonetheless coercive since it reasonably tends to interfere with employees' rights guaranteed by Section 8(a)(1) of the Act. I agree.

This record and the reasonable inferences to be drawn from it persuade me both that Respondent was aware that union activity had resumed at the facility, and that the imposition of the ''Access/Distribution/Solicitation Policy'' was a response to that activity. First, it was stipulated by the parties that prior to March 17, there had been no rules restricting employee solicitation or distribution. The record discloses that the rules were implemented about a month after the organizing activity began with a meeting at Sprecher's house on February 12. Respondent contends that these polices had been under consideration since the summer of 1993 and had been the subject of management discussion with drafts of the policies being considered before being adopted in final form and announced on March 17. Respondent, however, provided no documentation to support its position that the policy had been under active management consideration since the summer of 1993 nor any reasonable explanation for why they were adopted on March 17, on the heels of the Union's initial organizing effort.

Nor, based on this record, can I conclude that there was any greater need for the imposition of rules on March 17 than had been the case earlier. While Respondent argues that this solicitation policy was adopted in response to employee complaints about harassment, no employees testified to that effect and both Sprecher and Lias testified that solicitation had not been a problem.

Similarly, with respect to the access policy, which Respondent contended was necessary because of employee theft, the theft of industrial secrets by management employees, congestion, and an increase in accidents. It offered little except the unsupported testimony of Boylan and Reed to support this position. Nor does the record disclose why the change in the access policy was necessary or how the previous policy was inadequate.

While Respondent argues that it was unaware that the Union was engaged in any organizational effort at the time it implemented the rules on March 17, I conclude that a full review of the entire record supports the conclusion that the Respondent was aware. In this regard, it is significant to note that Good, at the time the rules were implemented on March 17, made statements to those supervisors present, as noted above, from which a valid inference can be drawn, that Respondent was aware of union activity at that time.

[7] Diaz did not appear as a witness nor did any of the management employees involved, except for Reed and Boylan.

[8] Witter, although she had investigated the case, was not present for either meeting.

In short, I conclude that Respondent was aware, sometime prior to March 17 when the ''Access/Distribution/Solicitation Policy'' was implemented, that an organizational effort was underway and that it was imposed as an unlawful response to that organizational effort in violation of Section 8(a)(1) of the Act. *Capitol EMI Music*, 311 NLRB 997, 1006 (1993).

c. *Suspension of Gregory Diaz*

As noted above, I have concluded that Respondent's adoption and implementation of the ''Access/Distribution/Solicitation Policy'' constitutes interference with employee rights guaranteed under Section 8(a)(1) of the Act, without regard to the validity of their content. Thus it is clear that Diaz was suspended pursuant to a rule which was unlawfully implemented even though its facial validity was not contested. In my opinion, since Diaz was suspended pursuant to an unlawfully adopted rule, his suspension violates Section 8(a)(1) of the Act.[9]

d. *Suspension of Glenda Gomez*

The General Counsel contends that Gomez' suspension was motivated by antiunion considerations, while Respondent takes the position that she was suspended for making threatening and intimidating remarks to a coworker, Janet Steininger. In my opinion, the General Counsel should prevail.

First, it is clear that Gomez was a union supporter. Respondent was made aware of her union sentiments by letter from Gomez herself advising Respondent that she would be organizing on behalf of the Union.

In support of its position, Respondent offered the testimony of Cathy Witter who obtained and investigated Steininger's complaint, and the testimony of Boylan and Reed who determined the discipline based on Witter's reports. Respondent, however, did not call Steininger, the purported victim, nor did Respondent call any of the witnesses interviewed by Witter.[10] Thus Respondent offered no probative, nonhearsay evidence of the incidents of threats and intimidation which formed the basis for its position that Gomez was suspended for having engaged in that misbehavior. Moreover, Gomez denied, with some specificity, ever having made threatening, harassing, or intimidating remarks to Steininger.

In these circumstances, I credit the unrebutted testimony of Gomez that she did not make threatening, harassing, or intimidating statements to Steininger.

I am satisfied, based on this record, that the General Counsel has established a prima facie case and that Respondent has not rebutted that case. Accordingly, I conclude that Gomez' suspension was motivated, as alleged, by Respondent's resolve to thwart the union organizational effort in violation of Section 8(a)(3) of the Act.

[9] Since the record contains clear and undisputed evidence that Jackie Titus and Daisy Martinez were also suspended for the same unlawful reason, I conclude that their suspensions also violate Sec. 8(a)(1) of the Act.

[10] While statements from several witnesses appear in the record, they were admitted only for the purpose of showing Respondent's motivation for suspending Gomez and not for the facts contained there. My rulings make it clear that these statements were hearsay and not admissible to establish the truth of their content.

e. *The 8(a)(1) allegations—Solomon, Hyneman, and Good*

In view of the credibility resolutions made above, I conclude that Solomon violated Section 8(a)(1) of the Act by interrogating Linda Lias on or about April 5 concerning her union sentiments. I further conclude that on April 6, Solomon unlawfully communicated to Renee Copeland the impression that her union activity was under surveillance by telling her that she knew that Copeland was campaigning for the Union. Such remarks unlawfully inhibit the right of employees to organize guaranteed under Section 8(a)(1) of the Act. I also find that Hyneman's statements to Copeland violated Section 8(a)(1) of the Act. Essentially, Hyneman told Copeland that union organization would be futile because Solomon would never sign a union contract; that if the employees were organized, they would lose their profit-sharing benefits; and that if they were organized and went on strike, they might lose their jobs and then be reemployed on other shifts.

Finally, I conclude that it was unlawful for Good, on April 11, to question Lias about her union sentiments; to implicitly threaten the loss of benefits, including profit sharing, if the employees became organized. I do not, however, find that it was unlawful to suggest that Lias come to Good or a supervisor if she had problems. This is simply a suggestion to take up her problems under the existing supervisory hierarchy and is not coercive.

C. *Objections—Facts, Analysis, and Discussion*

1. Objections 1 and 2

With respect to Objection 1, Emmanuel Gonzales was an employee of Labor Information Services (LIS) located in Malibu, California. LIS was contacted by Boylan in late May 1994 for the purpose of conducting meetings with Respondent's supervisory employees to instruct them on ''dos and don'ts'' under the NLRA. Having completed that work, it appears that Gonzales was then retained to conduct voluntary meetings with groups of nonsupervisory employees for the purpose of providing information to employees on their rights under the National Labor Relations Act. Some 14 such meetings were held in June 1994.

Michelle Seidel attended one of these meetings. She testified that she was unable to recall who introduced Gonzales but does recall that he identified himself as a ''representative of the Labor Relations Board'' and that he was there to discuss the ''pros and cons of the Union.''

Gonzales testified that at these meetings he was introduced by either Boylan or Reed as a ''consultant'' retained by the Company to provide information to employees on their rights as employees under the National Labor Relations Act. Gonzales states that he identified himself in the same fashion and never indicated that he came from or was affiliated with the National Labor Relations Board. This testimony is substantially corroborated by both Boylan and Reed. On a few occasions, Gonzales distributed his business card to employees. The business card identified him as a consultant from LIS in Malibu, California.

Having reviewed the relevant portions of the record, I am satisfied, particularly in view of Seidel's lack of recall about the only meeting she attended, that the corroborative testi-

mony of Gonzales, Boylan, and Reed should be credited and that Gonzales did not represent himself as an employee or representative of the National Labor Relations Board.

As to Objection 2, the Union offered the testimony of Linda Lias. According to Lias, she attended one of the meetings conducted by Gonzales. She, however, cannot recall the date. She testified that she was advised by Victor Leas, her supervisor, to attend the meeting and that they would be addressed by Manny Gonzales, ''an agent of the National Labor Relations.'' She attended the meeting but she cannot recall Gonzales being introduced at the meeting. Lias testified that Gonzales did not identify himself as a representative of the National Labor Relations Board.

Victor Leas testified that employees during their shifts voluntarily attended meetings conducted by Gonzales at their leisure. He recalled speaking to several employees, including Lias, and telling them that ''Mr. Gonzales'' was conducting the classes. He explained that Gonzales was an ''outside consultant'' and never identified him as anything else. Leas testified that he never told any employees, and specifically never told Lias, that Gonzales was an agent of the National Labor Relations Board. In determining whether Victor Leas told any employees that Gonzales was from the NLRB, it is necessary to decide credibility between the testimony of Leas and Lias. A review of the relevant testimony satisfies me that Victor Leas had a more comprehensive recollection of the significant events and that he did not tell her that Gonzales was from the NLRB.

In summary, I conclude that Objections 1 and 2 have not been established, and I shall recommend that they be overruled.

2. Objection 6

Terry Sprecher, a group leader supervisory employee, testified that she attended some meetings of supervisory employees conducted by Omega, Inc., a labor consultant to Respondent, wherein the employees were advised that it was their responsibility, as part of the Respondent's antiunion campaign to determine how people felt about the Union and to report their findings back to management. Sprecher also testified that the supervisors were instructed by Nancy Reed to talk to five employees per day in order to get a ''feel if they were for or against the Union'' and then to fill out a form on a computer screen to relay the results of these conversations to Reed and Good. Sprecher testified that supervisors were expected to transmit this information and that a failure to do so resulted in a followup request.

Respondent concedes that supervisors were instructed to talk to five employees per day, but that the purpose of the discussions were to ascertain employees' concerns and interests so as to improve the lines of communications between supervisors and employees, particularly since a number of group leaders had recently been promoted to supervisory status, including Sprecher, and establishing a rapport with employees was important for these new supervisors.

In my opinion, however, the record does not establish that either Omega or Respondent ''systematically and unlawfully instructed its supervisors to interview at least five employees each day regarding whether or not they supported UFCW Local 1776, after which the supervisors carried out these instructions and sent the results of the unlawful interrogations to the Human Resources Department by electronic mail on a daily basis.''

In these circumstances, I recommend that Objection 6 be overruled.

3. Objection 12

Michelle Seidel testified that about a week before the election on June 30, she went to work. Her shift began at 5 a.m. Before punching in, she changed into her uniform and went to get a hair net along with several other employees. The Company provides hair nets and requires that they be worn. The hair nets are contained in a box located in the cafeteria. On this morning, Seidel testified that when she went to get a hair net, all of the some 200 hair nets in the box were marked ''Vote No'' with what appeared to be a magic marker. Someone reported this to ''sanitation'' and in about 10 or 15 minutes, plain hair nets were brought up. Seidel and others put on the plain hair nets and went to work. Seidel testified that the ''Vote No'' hair nets were not removed.

With respect to this incident, Boylan testified that he was told about the existence of the ''Vote No'' hair nets by Hyneman and then told Reed to investigate the matter and remove the ''Vote No'' hair nets. Reed testified that at about 6:15 a.m., on instruction from Boylan, she went to the cafeteria where there were two bags of hair nets, one marked ''Vote No'' and the other plain. Reed testified that she removed the ''Vote No'' hair nets to the Human Resources office. According to Reed, there were no supervisors in the area to observe which employees took what hair net. Reed and Boylan both testified that they were unaware of the ''Vote No'' hair nets until told about them. There was no further investigation of this incident.

In my opinion, this objection should be overruled. The record is totally insufficient to establish any involvement on the part of Respondent in the marking and distribution of the hair nets, and the record will not support any inference to that effect. Moreover, when the existence of ''Vote No'' hair nets was reported, Respondent took prompt and reasonable steps to remove them. The record is insufficient to support the allegations contained in Objection 12 that ''the Employer forced employees to select and then wear 'Vote No' hair nets supplied by the Employer.''

4. Objection 14

On June 28, the day prior to the election, Michelle Seidel, who had been designated by the Union to be an observer at the election, approached her supervisor, Mark High, and told him that she was taking the day off tomorrow in order to serve as union observer at the election. Seidel testified that she was told by High that she would have to come to work like anyone else. High denies having denied her request. Both Seidel and High agree that he told her that he would have to check it out with management. Within the hour thereafter, according to Seidel (15 minutes according to High), he returned and told her it was okay to take the day off and not to worry about it. It is undisputed that Seidel served, without incident, as the union observer at the election.

This objection must fail because Respondent did not, as alleged in the objection, ''refuse to allow'' Seidel the day off to serve as the union observer. Nor was it objectionable con-

duct for High to defer a decision on the matter until he consulted with his superiors, and the delay, whether 15 minutes or an hour, was not unreasonable.

Accordingly, I conclude that Union Objection 14 should be overruled.

5. Objection 17

Objection 17 alleges that Solomon and Good ''systematically interrogated employees department by department as they were being called to vote.'' The record discloses only that on the day of the election, Solomon and Good spoke individually to employees, asking them to vote against the Union and not to give Sweet Street away to people who do not love it. The record is devoid of support for the allegation of interrogation set out in Objection 17 and, accordingly, I recommend that it be overruled.

6. Objection 18

Linda Gomez testified that on June 23 on the patio of the plant, she announced in front of several employees and two supervisors, Kim Weitzel and Tina Ullie, that she was going to vote against the Union in the election; this, despite her status as an in-plant organizer announced in her letter to Respondent dated April 11. According to Gomez, on the following day, she was called into Weitzel's office and told that she would be given a raise. This was a raise that Gomez had been requesting previously as already due to her because she had qualified for it but had been told by Weitzel that she had not had a chance to do the paperwork.

It appears that Respondent has a wage scale which provides for wage increases as employees reach greater skill levels as certified by supervision. The raise, however, is not always implemented on that date since an employee with an ''occurrence'' level[11] greater than three will not begin to receive the wage increase until the occurrence level has been reduced to three, at which time the wage increase is granted retroactively to the date that the employee qualified for the raise. Each occurrence is valued at one-quarter point; thus occurrences in excess of three may be worked off at a rate of one-quarter point per week.

In the case of Gomez, the record discloses that Weitzel verified her skill level as qualified for the wage increase on June 24. At that time, however, Gomez was not entitled to the raise because her occurrences exceeded three, standing at three and one-quarter. Thus her wage increase was delayed until she achieved another week without an occurrence. This occurred on July 1, at which time she was granted a wage raise retroactively to June 24.

While the Union contends that the timing of the wage increase made it objectionable, the record does not support this contention. There is nothing in the record to suggest that Gomez had not qualified for the raise; she testified that she herself had been requesting it prior to June 24. Moreover, the record discloses that although qualified, she was not given the raise until she had reduced her occurrence level to three, which occurred on July 1. Gomez concedes that she was told by Weitzel on June 24 that she would not be getting the increase because her occurrence level was too high.

[11] Occurrences were described as unexcused latenesses or absences.

In these circumstances, I conclude that the record does not support the Union's contention either that the granting of the wage increase or its timing was unlawful, and I shall recommend that Objection 18 be overruled.

IV. OBJECTIONS TO THE ELECTION

As noted above, I have concluded that the suspension of Glenda Gomez violated Section 8(a)(3) of the Act; further, the distribution policy, as well as the announcement and implementation of the entire ''Access/Distribution/Solicitation Policy'' were unlawful in violation of Section 8(a)(1) of the Act. These unfair labor practices also appear in Union Objections 3 and 4. Since I have found merit to these unfair labor practices, I also conclude that the objections based on these unfair labor practices are sufficient to warrant setting aside the election. It is therefore recommended that the Board set aside the June 30, 1994 election and remand Case 4–RC–18360 to the Regional Director for Region 4 for the purpose of conducting a new election at such time as he deems circumstances permit the free choice of a bargaining representative.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the Respondent's operations described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. THE REMEDY

Having found that Respondent has engaged in, and is engaging in unfair labor practices, I shall recommend that it cease and desist therefrom and take certain action designed to effectuate the policies of the Act. I have found that Respondent suspended Gregory Diaz, Jackie Titus, and Daisy Martinez for reasons which offend the provisions of Section 8(a)(1) of the Act, and Glenda Gomez for reasons which offend Section 8(a)(3) of the Act. I shall therefore recommend that Respondent make them whole for any loss of pay they may have suffered as a result of the discrimination practiced against them. All backpay and reimbursement provided here, with interest, shall be computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *F. W. Woolworth Co.*, 90 NLRB 289 (1950).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act, Respondent has engaged in and is engaging in unfair labor practices proscribed by Section 8(a)(1) of the Act.
4. By suspending Gregory Diaz, Jackie Titus, and Daisy Martinez, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. By suspending Glenda Gomez, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Sweet Street Desserts, Inc., Reading, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending or otherwise discriminating against employees for engaging in union and/or protected concerted activity.

(b) Interrogating employees about their union sentiments or activities.

(c) Threatening employees with loss of benefits if they select union representation.

(d) Telling employees that their selection of union representation would be futile.

(e) Threatening employees with loss of employment or transfer to less desirable shifts as a consequence of engaging in a strike.

(f) Creating the impression among employees that their union activities are under surveillance.

(g) Maintaining and enforcing an unlawfully broad ''Distribution'' policy.

(h) Maintaining and enforcing an unlawfully adopted ''Access/Distribution/Solicitation Policy.''

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Gregory Diaz, Jackie Titus, Daisy Martinez, and Glenda Gomez whole for any loss of pay they may have suffered as a result of the discrimination practiced against them in the manner set forth in the remedy section of the decision.

(b) Expunge from its files any reference to the suspensions of Gregory Diaz, Jackie Titus, Daisy Martinez, and Glenda Gomez, and notify them in writing that this has been done and that evidence of their unlawful suspensions will not be used as a basis for future personnel action against them.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Reading, Pennsylvania facility copies of the attached notice marked ''Appendix.''[13] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

The election held on June 30, 1994, in Case 4–RC–18360 is set aside and the case remanded to the Regional Director for Region 4 to conduct a new election when he deems that the circumstances permit the free choice of a bargaining representative.

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''